

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2004-000373-001 DT

07/18/2005

HONORABLE MARK R. SANTANA

CLERK OF THE COURT
K. Wendroff
Deputy

FILED: _____

SUMMERFIELD UNITS 1 & 2 HOMEOWNERS ASSOCIATION JAMES H HAZLEWOOD

v.

TREVOR RETTKE (001)

DAVID BURNELL SMITH

PHX JUSTICE CT-E2
REMAND DESK-LCA-CCC

MINUTE ENTRY

I. JURISDICTION

This court has jurisdiction pursuant to Article VI, Section XIV of the Arizona Constitution.

II. FACTS/PROCEDURAL HISTORY

This appeal arose out of litigation between Plaintiff, Summerfield Units I and 2 Homeowners Association (the Association) and defendants Trevor Rettke and Anne Cordes (Rettke) concerning unpaid Association fines. On April 24, 2003, Rettke made an Offer of Judgment to settle the case for the sum of "\$1,463.24 plus costs." The offer also stated "This figure is based on cumulative total for violations and late charges. This offer does not include attorney's fees."

The Association did not accept the Offer. The trial was held on July 15, 2003 at the Maricopa County Justice Court, East Phoenix No.2 Precinct. The trial court entered judgment for the Association in the amount of \$1,050.00 plus costs and attorneys fees. The court awarded \$120.00 in costs and \$6,815.00 in attorney's fees.

Rettke filed a timely appeal. Rettke's appeal is limited to the attorney's fees award.

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III. ANALYSIS

A. Introduction

Rettke argues that: (1) the Association is not entitled to an award of attorney's fees and (2) the attorney's fees awarded are excessive and unreasonable.

B. Is the Association entitled to an award of attorney's fees and costs?

1. Is A.R.S. § 12-341.01 applicable to this case?

Rettke admits that a contract, which includes the "Declaration of Horizontal Property Regime" which governs the Association, exists between the parties but contends that the Association should not be granted its attorney's fees. Citing A.R.S. § 12-341.01, Rettke correctly argues that the statute permits, but does not require a trial court to award attorney's fees in a contested contract action. But Rettke ignores the section of the Declaration providing for an award of reasonable attorneys fees incurred by the Association in bringing an action to recover for assessments and charges. Declaration, ¶10(B). Where a contract provides for an award of attorney's fees to the prevailing party, A.R.S. § 12-341.01 is inapplicable. Swets v. Chatwin, 120 Ariz. 249, 252, 585 P.2d 269, 272 (Ct. App. 1978). While A.R.S. § 12-341.01 gives a court discretion in deciding whether to award attorney's fees, a court does not have discretion to refuse to award contractually authorized attorney's fees. Chase Bank of Ariz. v. Acosta, 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (Ct. App. 1994).

Moreover, the Association would also be entitled to attorney's fees pursuant to A.R.S. § 33-1256(H) which provides that the trial court "*shall* include costs and reasonable attorney's fees to the prevailing party (emphasis, the Court's)." It is undisputed that A.R.S. § 33-1256 is applicable to this matter. The trial court was statutorily required to award attorney's fees to the prevailing party.

2. Is the Association the prevailing party?

Rettke argues that the Association is not the prevailing party pursuant to A.R.S. § 33-1256(H). Rettke asserts that the Association is not entitled to attorney's fees because the Association's award, \$1050.00 is less than the amount of Rettke's \$ \$1,463.24 Offer of Judgment. Rettke is incorrect.

First, assuming the Association is not the prevailing party, it would still be entitled to its attorney's fees pursuant to the Section 10 (B) of the Declaration, which permits the Association to recover attorney's fees whenever it obtains a money judgment to enforce community assessments and charges. Having obtained a judgment against Rettke, the Association is contractually entitled to attorney's fees, regardless of whether it is the prevailing party for purposes of A.R.S. § 33-1256(H).

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Moreover, an offer of judgment is only enforceable if it complies with the provisions of A.R.C.P. Rule 68(c), which requires that if attorney's fees are sought in an action, an offer must set forth separately, as a *specific stated sum*, (emphasis, the Court's): (1) the amount of the monetary award and (2) the amount of attorney's fees to be awarded if the offer is accepted. Rettke's offer fails to include a separate specific stated sum for attorney's fees; it does not comply with Rule 68(c). Indeed, the offer is sufficiently ambiguous that it can be interpreted as either offering "zero" for attorney's fees, leaving the fee issue to be determined by the trial court or not addressing the issue at all. Rettke's Offer of Judgment is invalid.

The trial court awarded the majority of the assessments and charges sought by the Association. The Association is the prevailing party; it is entitled reasonable attorney's fees pursuant to A.R.S. § 33-1256(H).

C. Is the award of attorney's fees unreasonable and excessive?

The trial court awarded \$ 6,815.00 in attorney's fees. Rettke's argues that the amount is unreasonable and excessive, because the monetary award is only \$1050.00. But the determination of what is "reasonable" is within the discretion of the trial court. Chase Bank of Arizona v. Acosta, 179 Ariz. 563, 574-75, 880 P.2d 1109, 1120-21 (Ct. App. 1994). This Court has reviewed the record and the Association's application for attorney's fees. The record indicates that a significant portion of the Association's fees were incurred due to Rettke's own actions. Although the amount of fees awarded is substantial in relation to the monetary award, this Court cannot find that the fee award is unreasonable. The reality is that the assessments, charges or fines sought by the Association are likely to be dwarfed by the hourly cost of an attorney.

The award of attorney's fees is neither unreasonable nor excessive.

IV. CONCLUSION

The Court concludes that the Association was entitled to attorney's fees and that amount of fees awarded is neither unreasonable nor excessive.

The Association has requested attorney's fees and costs on appeal and is entitled to an award.

IT IS ORDERED:

- (1) **Affirming the judgment of the trial court;**
- (2) **The Association shall file any application for attorney's fees and costs by Friday, August 12, 2005;**
- (3) **Rettke shall file any response by Friday, August 26, 2005.**

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